

1 DIVISION OF LABOR STANDARDS ENFORCEMENT  
2 Department of Industrial Relations  
3 State of California  
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8 Attorney for the Labor Commissioner

9  
10 BEFORE THE LABOR COMMISSIONER  
11  
12 OF THE STATE OF CALIFORNIA  
13  
14

15 BURT BLUESTEIN, aka BURTON IRA )  
16 BLUESTEIN )

17 Petitioner, )

18 vs. )

19 Case No. TAC 24-98

20 DETERMINATION OF  
21 CONTROVERSY

22 PRODUCTION ARTS MANAGEMENT; )  
23 GARY MARSH; STEVEN MILEY; MICHAEL )  
24 WAGNER; )

25 Respondents. )  
26 )  
27 )  
28 )

29 INTRODUCTION

30 The above-captioned petition was filed on August 13,  
31 1998, by BURT BLUESTEIN (hereinafter "Petitioner"), alleging that  
32 GARY MARSH; STEVEN MILEY; and MICHAEL WAGNER dba PRODUCTION ARTS  
33 MANAGEMENT, (hereinafter "Respondents" or "PAM"), acted as  
34 petitioner's exclusive talent agent with respect to all areas  
35 concerning petitioner's services within the entertainment industry.  
36 Petitioner alleges that respondent induced petitioner to entering  
37 into the representation agreement by misrepresenting themselves as  
38 a talent agent, when in fact respondent did not possess a talent  
39 agency license as required by Labor Code §1700.5. Petitioner  
40 alleges respondents breached their fiduciary duty owed to  
41 petitioner by not using their best efforts on his behalf. By this

1 petition, petitioner seeks the contract be deemed void *ab initio*  
2 and requests reimbursement for all commissions paid to respondents  
3 during the life of the contractual relationship.

4 Respondents through their attorney filed a response on  
5 November 6, 1998, stating in short, respondents were managers; they  
6 did not procure employment for petitioner; did not act in the  
7 capacity of a talent agent; and in the event incidental procurement  
8 activity existed, a talent agency license was secured during the  
9 applicable time period. A hearing was held on October 13, 1999,  
10 before the undersigned attorney for the Labor Commissioner.  
11 Petitioner appeared through his counsel Cynthia E. Fruchtmann.  
12 Respondent, Production Arts Management, appeared through counsel  
13 Gregory T. Victoroff of Rhode & Victoroff; Michael Wagner as an  
14 individual appeared through his counsel Gregory S. Chudacoff.  
15 Based upon the testimony and evidence presented at this hearing,  
16 the Labor Commissioner adopts the following Determination of  
17 Controversy.

18  
19 **FINDINGS OF FACT**

20 1. In 1995, Michael Wagner, then an employee of  
21 Production Arts Management, pursued petitioner seeking a  
22 supplemental client for respondents management group. PAM was  
23 formed for the purpose of guiding, counseling and directing careers  
24 in the entertainment industry. Mr. Wagner promised petitioner,  
25 that PAM would use best efforts to advise and counsel petitioner in  
26 all areas of the entertainment industry, as well as, actively  
27 pursue employment on petitioner's behalf.

28 2. On October 3, 1995, petitioner entered into a

1 contractual relationship with respondents for the above described  
2 services. Respondents compensation was 10% of petitioner's gross  
3 earnings for all work performed in the entertainment industry,  
4 throughout the world as a production manager/line producer. It was  
5 stipulated that respondents were not licensed talent agents when  
6 the parties entered into the management agreement.

7 3. During the relationship, petitioner obtained  
8 numerous employment opportunities with various production  
9 companies. Respondents collected 10% for each job petitioner  
10 performed as a production manager/line producer.

11 4. Petitioner's duties and responsibilities as a  
12 production manager/line producer primarily included working in  
13 conjunction with and maintaining the production companies proposed  
14 budget. Petitioner testified, "I hold the line on the budget."  
15 When asked to describe exactly what "holding the line on the budget  
16 meant", petitioner stated, "I convince the creative people, the  
17 canvas has a size." Petitioner added, "the script is the blueprint  
18 and I turn it into time and money." Upon supplemental testimony  
19 buttressing these abstract answers, it became clear that  
20 petitioner's responsibility and input toward the creation of the  
21 production fell within the ambit of maintaining the financial  
22 structure of the project. When asked specifically what his day to  
23 day duties entailed, petitioner stated, "I advise the people who  
24 provide the money. We share that responsibility and once the money  
25 is out, I sign the checks."

26 5. Petitioner's creative responsibilities were a  
27 significant interest to the hearing officer. When asked whether  
28 petitioner took any part in the creative process of the production,

1 he stated, "no, I do not". The parties were instructed the  
2 creative aspect of petitioner's duties were dispositive of the  
3 Labor Commissioner's jurisdiction, and complete testimony was  
4 necessary regarding this issue. Petitioner's wife testified that  
5 her husband at times acted as a second director. When asked to  
6 describe exactly petitioner's duties as a second director for  
7 purposes of examining creative input, petitioner testified, "if  
8 there is a time consuming stunt, the principle director will design  
9 the shot so that second unit can do the stunt. Then the principle  
10 can go film the actors and get the words." The petitioner stated  
11 this process was conducted for the purpose of saving time and  
12 money, as the actors need to be paid for intervening time and it  
13 was his responsibility to keep the actors working in an efficient  
14 manner.

15           6. Again, when asked to describe **any** creative functions  
16 or activities petitioner provided as a production manager/line  
17 producer, petitioner stated, "the creative aspects [of the job] is  
18 how to schedule." Petitioner states it was his responsibility to  
19 schedule the shots, schedule construction, and keep the production  
20 moving efficiently. Petitioner added, at times he chose the  
21 stuntmen, the camera angles and occasionally assisted in choosing  
22 the location to shoot a particular scene.

23           7. In April of 1998, disenchanted with respondent's  
24 performance, petitioner executed a severance letter terminating the  
25 relationship between the parties. Petitioner's subsequent  
26 investigation into the licensing history of respondents, unveiled  
27 respondent's unlicensed talent agency status throughout the  
28 majority of the relationship. Petitioner realizing that without a

1 talent agency license, respondents were precluded from engaging in  
2 talent agency activities, namely the procurement of employment.  
3 Petitioner filed the instant petition to determine controversy with  
4 the Labor Commissioner, pursuant to Labor Code §1700.44, seeking a  
5 determination that respondent's, PAM; Gary Marsh; Steven Miley; and  
6 Michel Wagner, violated Labor Code §1700.5 by having functioned as  
7 talent agents without a license. As a consequence of this alleged  
8 violation of the Talent Agencies Act, petitioner seeks the parties  
9 agreements are void *ab initio* and that respondent's have no rights  
10 thereunder.

#### 11 CONCLUSIONS OF LAW

12 1. Labor Code §1700.44 vests the Labor Commissioner with  
13 exclusive and primary jurisdiction in cases arising under the  
14 Talent Agencies Act. The Act governs the relationship between  
15 artists and talent agencies.

16 2. The issue at bar is whether petitioner's job  
17 responsibilities as a production manager/line producer performed  
18 during the life of the management agreement fall within the  
19 definition of "artist" found at Labor Code §1700.4(b).

20 3. Labor Code §1700.4(a) defines "talent agency" in  
21 pertinent part as: "a person or corporation who engages in the  
22 occupation of procuring, offering, promising, or attempting to  
23 procure employment or engagements **for an artist or artists...**"  
24 Therefore, if petitioner does not fall within the definition of  
25 "artist", it follows that respondents could not have acted as a  
26 talent agency, which divests the Labor Commissioner of jurisdiction  
27 to hear this matter.  
28

1 Labor Code §1700.4(b) defines "artists" as:

2 actors and actresses rendering services on the legitimate  
3 stage and in the production of motion pictures, radio  
4 artists, musical artists, musical organization, directors  
5 of legitimate stage, motion pictures and radio  
6 productions, musical directors, writers,  
7 cinematographers, composers, lyricists, arrangers,  
8 models, and other artists rendering professional services  
9 in the motion picture, theatrical, radio, television and  
10 other entertainment enterprises."

11 4. Although Labor Code §1700.4(b) does not expressly  
12 cover the term "line producer" or "production manager" within the  
13 definition of "artist", the broadly worded definition does leave  
14 room for interpretation. The statute ends with the phrase, **"and**  
15 **other artists and persons rendering professional services in...**  
16 **other entertainment enterprises."** This open ended phrase indicates  
17 the Legislature's anticipation of occupations which may not be  
18 expressly listed but warrant protection under the Act, or industry  
19 developments not contemplated at the time of drafting.

20 5. The Labor Commissioner has historically taken the  
21 following position with respect to this phrase. As discussed in a  
22 1996 Certification of Lack of Controversy, the special hearing  
23 officer held, "[d]espite this seemingly open ended formulation, we  
24 believe the Legislature intended to limit the term 'artists' to  
25 those individuals who perform creative services in connection with  
26 an entertainment enterprise. Without such a limitation, virtually  
27 every 'person rendering professional services' connected with an  
28 entertainment project - - would fall within the definition of  
"artists". We do not believe the Legislature intended such a  
radically far reaching result." *American First Run Studios v.*  
*Omni Entertainment Group No. TAC 32-95, pg. 4-5.*

6. This is not to imply that production managers or

1 line producers can never be considered "artists" within the meaning  
2 of 1700.4(b), only there must be a significant showing that the  
3 producer's services were creative in nature as opposed to services  
4 of an exclusively managerial or business nature. Here, petitioner  
5 testified he did not occupy such a role and conversely testified  
6 the bulk of his responsibility was maintaining the budget through  
7 schedule enforcement. Occasionally assisting in shot location or  
8 stepping in as a second director as described by petitioner, does  
9 not rise to the creative level required of an "artist" as intended  
10 by the drafters. Virtually all line producers or production  
11 managers engage in de minimis levels of creativity. There must be  
12 more than incidental creative input. The individual must be  
13 primarily engaged in or make a significant showing of a creative  
14 contribution to the production to be afforded the protection of the  
15 Act. We do not feel budget management falls within these  
16 parameters.

17 7. Who did the Legislature intend to include in the  
18 protected class? In determining legislative intent, one looks at  
19 both legislative history and the statutory scheme within which this  
20 statute is to be interpreted.

#### 21 Legislative History

22 8. In 1913 the "Employment Agencies Act" regulated a  
23 select few industries, including California's entertainment  
24 industries, namely circuses, vaudeville and theater. Protection  
25 focused on exhibitors and performers.

26 9. In 1937 the California Labor Code was established.  
27 The Legislature added "the motion picture employment agency" as an  
28 industry that required regulatory controls.

1           10. By 1959 the Labor Code included regulation of four  
2 categories of agents: employment agents; theatrical employment  
3 agents; motion picture employment agent; and the so-called  
4 "artists' manager." While the other categories were either  
5 repealed or moved to a different body of law and placed under the  
6 jurisdiction of other regulatory agencies, regulation of "artists'  
7 managers" remained in the Labor Code and under the jurisdiction of  
8 the Labor Commissioner. In 1978, the Act was renamed the Talent  
9 Agencies Act (1978, Stats. Ch. 1382) and "artists' managers" became  
10 "talent agents" and remains this way today. Throughout, the  
11 definition of "artist" always expressly included only the creative  
12 forces behind the entertainment industry.

13           11. In 1982, AB 997 established the California  
14 Entertainment Commission. Labor Code §1702 directed the Commission  
15 to report to the Governor and the Legislature as follows:

16           The Commission shall study the laws and practices of this  
17 state,...relating to the licensing of agents, and  
18 representatives of artists in the entertainment industry  
19 in general, ... so as to enable the commission to  
20 recommend to the Legislature a model bill regarding this  
21 licensing.

22           12. Pursuant to statutory mandate the Commission studied  
23 and analyzed the Talent Agencies Act in minute detail. The  
24 Commission concluded that the, "Talent Agencies Act of California  
25 is a sound and workable statute and that the recommendation  
26 contained in this report will, if enacted by the California  
27 Legislature, transform that statute into a model statute of its  
28 kind in the United States." (Report pg. 5) All recommendations



1 were reported to the Governor, accepted and subsequently signed  
2 into law.

3           13. This is not to say the Legislature has never  
4 expanded on the term "artist". A very significant change made by  
5 the Commission was to add the occupation of "models" to the  
6 definition of artist as defined by Labor Code §1700.4(b). The  
7 Commission reasoned that, "as persons who function as an integral  
8 and significant part of the entertainment industry, models should  
9 be included within the definition of artist." (Report p. 33-34) I  
10 am not advocating that production managers and line producers are  
11 not an integral and significant part of the entertainment industry,  
12 I am simply stating that if the Commission, who by statutory  
13 mandate analyzed the Act in minute detail, thought that production  
14 managers and/or line producers required express protection under the  
15 Act, they could have made this recommendation to the Legislature.  
16 This was certainly the forum do make such a recommendation.  
17 Production managers and line producers are not new occupations in  
18 the entertainment industry resulting from industry evolution i.e.,  
19 interactive media and digital animation. These are well  
20 established industry occupations. The Commission's utter silence  
21 with respect to production managers and line producers can only be  
22 interpreted, that the Labor Commissioner's jurisdiction is invoked  
23 if in the discretion of the hearing officer, a significant showing  
24 of creative contribution is made.

25           14. The Division concludes that petitioner is not an  
26 artist within the meaning of Labor Code 1700.4(b), not engaged in  
27 the performing arts and hence, not a member of the protected class.

28           15. Once it is determined that petitioner was not an

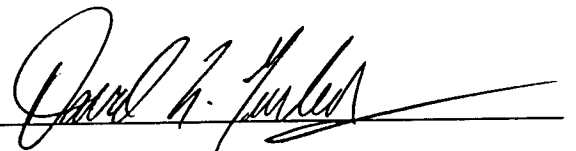
1 "artist", it follows that respondents are not "talent agents", as  
2 a talent agency is defined as procuring employment for "artists".

3 16. We therefore find the parties agreement does not  
4 fall within the provisions of the Talent Agencies Act.  
5 Consequently, there are no grounds under the Act to declare the  
6 parties agreement void. The Labor Commissioner is without  
7 jurisdiction to hear or decide the merits of this case.  
8  
9

10 ORDER

11 For the above-state reasons, IT IS HEREBY ORDERED that  
12 this petition is denied and dismissed on motion by the undersigned  
13 hearing officer.  
14  
15  
16

17  
18 Dated: 11/3/99



DAVID L. GURLEY

Attorney for the Labor Commissioner

21  
22 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:  
23  
24

25  
26 Dated: 11/3/99



RICHARD CLARK

Chief Deputy Labor Commissioner

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS - DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL  
(C.C.P. §1013a)

BURT BLUESTEIN, AKA BURTON IRA BLUESTEIN vs. PRODUCTION ARTS  
MANAGEMENT; GARY MARSH; STEVEN MILEY; MICHAEL WAGNER  
CASE NO: TAC 24-98

I, Benjamin Chang, do hereby certify that I am employed in  
the county of San Francisco, over 18 years of age, not a party to  
the within action, and that I am employed at and my business  
address is 455 Golden Gate Avenue, 9<sup>th</sup> Floor, San Francisco, CA  
94102.

On November 4, 1999, I served the following document:

**DETERMINATION OF CONTROVERSY**

by placing a true copy thereof in envelope(s) addressed as  
follows:

CYNTHIA E. FRUCHTMAN, ESQ.  
2530 WILSHIRE BLVD., SUITE 310  
SANTA MONICA, CA 90403

GREGORY T. VICTOROFF, ESQ.  
ROHDE & VICTOROFF  
1880 CENTURY PARK EAST, SUITE 411  
LOS ANGELES, CA 90067

GREGORY S. CHUDACOFF, ESQ.  
12100 WILSHIRE BLVD, SUITE 1100  
LOS ANGELES, CA 90025

and then sealing the envelope with postage thereon fully prepaid,  
depositing it in the United States mail in the city and county of  
San Francisco by ordinary first-class mail (certifies mail).

I certify under penalty of perjury that the foregoing is  
true and correct. Executed on November 4, 1999, at San  
Francisco, California.

  
BENJAMIN CHANG